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UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN THE MATTER OF ALLISON
CLAIRE

Case No. 09-80179

ORDER

Allison Claire is an Assistant Federal Defender in the Office of the Federal Public Defender for the Eastern District of California ("FPD"). Although she is legally married to Teri McKown under California law, she has not been permitted to enroll McKown as a family member beneficiary of her federal health insurance plan because both spouses are of the same sex. Claire has filed a complaint alleging that the denial of benefits on this ground violates the Ninth Circuit's Employment Dispute Resolution Plan for Federal Public Defenders and Staff ("EDR Plan"), which expressly prohibits discrimination on the basis of sex and sexual orientation. As a remedy for that violation, she now requests a monetary award pursuant to the Back Pay Act. *See* EDR Plan at A-13 (authorizing an award of back pay to a successful complainant if "the statutory criteria of the Back Pay Act, 5 U.S.C. § 5596, are satisfied"). In my role as Chair of the Ninth Circuit's

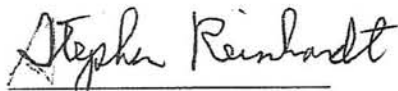
Standing Committee on Federal Public Defenders at the time of the complaint's filing, and presently as designee of the current Chair of the Standing Committee, I am charged with hearing and ruling upon Claire's complaint and fashioning a "necessary and appropriate" remedy. *Id.* at A-10, A-13.

For the reasons stated in *In re Levenson*, No 09-80172, slip op. at 15541 (9th Cir. Nov. 18, 2009), a matter involving the same issues of law and the identical EDR Plan, I find that the denial of federal benefits for Claire's spouse constitutes discrimination on the basis of sex and sexual orientation in violation of the protections guaranteed to FPD employees under the EDR Plan. I further find that this violation of Claire's rights has caused "the withdrawal or reduction of all or part of [her] pay, allowances, or differentials" through a "personnel action" that was "unjustified or unwarranted" within the meaning of the Back Pay Act.¹ *See id.* at 15554-57. Accordingly, I grant her request for a monetary award, and remand the matter to the FPD to determine the actual amount to be awarded. On remand, the FPD in consultation with Claire shall follow the guidance set forth in *In re*

¹In this order, I have determined that Claire's rights have been violated, and I have granted the relief she requested as a remedy for that violation. Accordingly, this order qualifies as a "correction of the personnel action" within the meaning of the Back Pay Act. *See In re Levenson*, slip op. at 15557-58 (interpreting 5 U.S.C. § 5596(b)(1) to create back pay eligibility upon "the determination by an appropriate authority that the personnel action has violated the employee's rights and the issuance of an appropriate order to correct that action").

Levenson in computing the amount due to date, and shall determine whether amounts that may accrue following the period covered by such payment shall be paid on a monthly, quarterly, or other basis.

I retain jurisdiction over this matter so that I may resolve any disputes that may arise on remand and so that I may issue any further order that may be necessary.



Stephen Reinhardt
Circuit Judge